

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 07 June 2004***In the matter of*

**Timothy Salmons**  
Claimant

v.

Case No.2003-BLA-06055

**Bledsoe Coal Corporation**  
Employer

and

**Director, Office of  
Workers' Compensation Programs**  
Party in Interest

**Appearances:**

Edmond Collett, Esq.  
For the Claimant

John H. Baird, Esq.  
For the Employer

**Before:**

Daniel F. Solomon  
Administrative Law Judge

**DECISION AND ORDER DENYING CLAIM<sup>1</sup>**

**Jurisdiction and Claim History**

This case comes on an March 6, 2003 request for a hearing pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901 *et seq.*

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<sup>1</sup> 20 CFR § 725.477, 5 CFR § 554-7 (Administrative Procedure Act), and also 20 CFR § 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see §§ 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see §§ 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under §§ 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

(the Act) (DX 36)<sup>2</sup>.

A hearing was held January 8, 2004, in London, Kentucky. The claimant is represented by Edmond Collett, Esquire, Edmond Collett, PSC, Hyden, Kentucky. Bledsoe Coal Corporation (hereinafter "Employer") is represented by John H. Baird, Esquire, Baird & Baird, PSC, Pikeville, Kentucky. The claimant appeared and testified. Subsequent to the hearing, the parties submitted closing briefs. After the hearing, Employer submitted the December 15, 2003 deposition of Dr. Lawrence Repsher. However, at the hearing and in its pre-hearing report, Employer did not choose to make Dr. Repsher's medical report dated December 4, 2003 part of its case-in-chief or its rebuttal evidence. Consequently, I will not consider Dr. Repsher's report or deposition.

The current claim seeking black lung benefits was filed on June 14, 2001. After review by the District Director that claim was denied on February 25, 2003 (DE 35). The Claimant, on March 6, 2003, requested a hearing before an administrative law judge (DE 36). The claim was referred to this office on May 30, 2003 (DE 40).

As Mr. Salmons's most recent coal mine employment, between 1995 and 1997, was with Bledsoe Coal Corporation at a mine in Kentucky, the rulings of the U.S. Court of Appeals for the Sixth Circuit control this case. See **Kopp v. Director**, OWCP, 877 F.2d 307 (4th Cir. 1989).

Mr. Salmons testified that he began work as a roof bolter, a dusty job that required physical manual labor (Tr. 10-11). He also drove a scoop, drove a shuttle car, ran a miner, helped make belt setups, and drove a rail runner. All of these jobs, except that of rail runner, exposed him to considerable coal mine dust and required heavy lifting (Tr. 10-15). His last job was as a scoop driver, a job he performed until his last day of work in 1997 (Tr. 15). As a scoop driver, he hauled supplies, cleaned up the face of the mine, and rock dusted. He left coal mining because he couldn't do the job any longer and because he suffered a knee injury when a rock fell on him (*Id.*; Tr. 20).

Mr. Salmons was born May 14, 1955, and has a high school education (Tr. 10). His wife, Sharon, is his only dependent (Tr. 10; DE 10). Mr. Salmons testified that he has never smoked (Tr. 10). He suffers from diabetes, high blood pressure, and cholesterol problems, and has difficulty with his knees and back (Tr. 16). Claimant has treated with Dr. James Chaney for a long time, and he has prescribed inhalers. He sees Dr. Chaney about every month recently (Tr. 22). He has difficulty tolerating perfume, the smell of cooking, and cleaning agents. He sleeps on five pillows and smothers at night, awakening several times a night (Tr. 17-18). Mr. Salmons has a productive cough in the morning and at night, when he also experiences wheezing. He has difficulty exerting himself, finding that he becomes light headed and short of breath (Tr. 18). He can walk 100 yards without becoming short of breath but finds inclines difficult. *Id.* Mr. Salmons believes that even if his only health problem were his breathing, he could not return to coal mine employment.

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<sup>2</sup> References to "DE," "CX," "EX" refer to the exhibits of the Director, the Claimant, and the Employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

Mr. Salmons deposed that he received two lump sum Kentucky workers' compensation awards—one for \$15,000.00 based on his back injury and the other for \$10,000.00 based on Black Lung (DE 8; DE 27, p. 10-11; Tr. 21-22). He receives approximately \$1500.00 a month in Social Security Disability Insurance benefits based on his back, knees, and breathing problem (Tr. 15-16, 21).

This claim was filed after March 31, 1980. For this reason, the Regulations at 20 CFR Part 718 apply. 20 CFR § 718.2 (2002). In order to establish entitlement to benefits under Part 718, Claimant must establish that the Miner suffered from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis was totally disabling. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2002).

"Burden of proof," as used in the this setting and under the Administrative Procedure Act<sup>3</sup> is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)<sup>4</sup>. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. *Director, OWCP, Department of Labor v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).<sup>5</sup>

A claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.<sup>6</sup> Therefore, the claimant cannot rely on the Director to gather evidence.<sup>7</sup> A claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

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<sup>3</sup> 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

<sup>4</sup> The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); *Kaiser Steel Corp. v. Director, OWCP* [Sainz], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

<sup>5</sup> Also known as the risk of nonpersuasion, see 9 J. Wigmore, *Evidence* § 2486 (J. Chadbourn rev.1981).

<sup>6</sup> *Id.*, also see *White v. Director, OWCP*, 6 BLR 1-368 (1983)

<sup>7</sup> *Id.*

### Issues

1. Whether the medical evidence establishes that the Miner suffers from pneumoconiosis pursuant to 20 CFR § 718.202(a);
2. Whether the pneumoconiosis arose, at least in part, out of coal mine employment;
3. Whether the claimant is totally disabled; and
4. Whether total disability is caused by pneumoconiosis pursuant to § 718.204.

### Stipulations

Pursuant to 20 CFR § 725.461 (a), which sets forth in part pertinent, "...stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence," the parties have agreed to the following:

1. The timeliness of filing of the claim,
2. That the claimant was a miner,
3. Mr. Salmons worked 20 years in coal mine employment.
4. The responsible operator in this case is Bledsoe Coal Corporation.
5. The claimant's wife, Sharon, is a "dependent" for augmentation purposes. See Tr. 7-8, 30.

Subsequently, the parties agreed that the following is an accurate description of the medical record:

#### X-RAY INTERPRETATIONS

<u>DATE OF X-RAY</u>	<u>DATE OF READING</u>	<u>EXH.</u>	<u>PHYSICIAN/ QUALIFICATIONS<sup>8</sup></u>	<u>INTERPRETATION</u>
06/20/01	06/20/01	DE 14	Baker, B	1/0; p/q; 6 zones
06/20/01	07/17/02	DE 34, p. 2 <sup>9</sup>	Wheeler, B, BCR	No silicosis or CWP
10/02/01	10/02/01	EX 2	Broudy, B	0/1; s/p; 4 zones
11/02/01	11/02/01	DE 18	Hussain	2/2; p/s; 6 zones
11/02/01	10/04/03	CX 1	Alexander, B, BCR	1/1; p/t; 6 zones
11/02/01	07/17/02	DE 34, p. 4	Wheeler, B, BCR	No silicosis or CWP
12/16/03	12/16/03	EX 7	Dahhan, B	Negative

#### PULMONARY FUNCTION STUDIES

<u>DATE</u>	<u>EXH.</u>	<u>PHYSICIAN</u>	<u>FVC</u>	<u>FEV<sub>1</sub></u>	<u>MVV</u>	<u>QUALIFYING?</u>	<u>Ht/Age</u>
06/20/01	DE 14	Baker	5.04	4.11	123	NO	71"/46

<sup>8</sup> "B" signifies B-reader  
"BCR" signifies board certified radiologist

<sup>9</sup> Employer's counsel stated at the hearing that Employer would not be relying on DE 34, pages 2, 3, and 4, as these interpretations by Dr. Wheeler exceeded the regulatory limits (Tr. 5-6, 30). However, on Employer's pre-hearing report, Dr. Wheeler's readings of the June 20, 2001 and November 2, 2001 x-rays are listed as rebuttal evidence. These two readings are DE 34, p. 2 and DE 34, p. 4, respectively. They do not exceed the limits found at § 725.414(a)(2)(ii) and (3)(ii) (2001). Therefore, they are admitted into evidence and I will consider them in rendering my decision.

Found valid by Dr. Vuskovich (EX 6). Dr. Vuskovich is board certified in occupational medicine (EX 5).

11/02/01	DE 17	Hussain	5.01	4.18	65	NO	72"/46
Found valid by Dr. Vuskovich (EX 4 ).							
10/02/01	EX 2	Broudy	5.48	4.49	121	NO	70"/46
12/16/03	EX 7	Dahhan	4.38	3.68	72	NO	70"/48

#### **ARTERIAL BLOOD GAS STUDIES<sup>10</sup>**

<u>DATE</u>	<u>EXH.</u>	<u>PHYSICIAN</u>		<u>pCO<sub>2</sub></u>	<u>PO<sub>2</sub></u>	<u>QUALIFYING</u>
06/20/01	DE 14	Baker	R	34	90	NO
10/02/01	EX 2	Broudy	R	36.7	82.5	NO
11/02/01	DE 16	Hussain	R	36.4	84	NO
			E	36.5	98	
12/16/03	EX 7	Dahhan	R	33.2	78.9	NO

### **Medical Evidence**

Dr. Glen R. Baker examined Mr. Salmons at the request of the Claimant, on June 20, 2001 (DE 14). Dr. Baker considered 20 years of coal mine employment where he ran a miner, scoop, shuttle car, and roof bolter; a history of never smoking; symptoms of difficulty breathing for the last four years with shortness of breath on exertion, a daily productive cough and wheezing, and five- or six-pillow orthopnea; a medical history significant for a cardiac catheterization, arthritis of the knee, diabetes mellitus, hypertension, hyperlipidemia, and depression; and the results of a physical examination that was showed clear lungs with no rales or wheezes. He ordered a chest x-ray, pulmonary function study, and blood gas study. Dr. Baker diagnosed coal workers' pneumoconiosis based on an abnormal x-ray and significant history of dust exposure, and bronchitis based on history. He could conceive of no other condition to account for the x-ray changes. Dr. Baker assessed a Class I impairment "with the FEV1 and vital capacity being greater than 80% of predicted." He found a second impairment, based on the Guides to the Evaluation of Permanent Impairment, stating that it states that anyone with pneumoconiosis should limit further exposure to the offending agent. Dr. Baker concluded that "This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." He further opined that any pulmonary impairment the miner suffers is the result of exposure to coal dust in the processing of coal, reasoning that Mr. Salmons has never been a smoker, has a long history of underground dust exposure, and has a positive x-ray. Dr. Baker is board certified in internal medicine and pulmonary disease.

Dr. Bruce C. Broudy, who is board certified in internal medicine and pulmonary disease, was requested by the Employer to perform an examination to determine the presence or absence of coal workers' pneumoconiosis (EX 2, 3). Dr. Broudy examined Mr. Salmons on October 2,

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<sup>10</sup> "R" - signifies resting test  
 "E" - signifies exercise test

2001 and elicited a coal mine employment history of 20 years, performing various jobs including miner operator, scoop driver, roof bolter, and jeep driver; a medical history significant for cardiac catheterization, diet-controlled diabetes, high blood pressure, low back pain, carpal tunnel surgery, a lack of hand strength, and knee pain; and a history of never having smoked. He noted complaints of orthopnea, shortness of breath upon minimal exertion, and problems sleeping. Dr. Broudy had a chest x-ray and CAT scan taken and administered ventilatory and blood gas studies. He performed a physical examination that showed clear lungs. He concluded the miner does not suffer from coal workers' pneumoconiosis but did diagnose back and knee pain, diabetes, obesity, a history of coronary artery disease, and a history of chronic bronchitis. Based on the normal results elicited from the pulmonary function study and blood gas study, he opined that the claimant's dyspnea is non-pulmonary in origin. Thus, Dr. Broudy found no significant pulmonary disease or respiratory impairment which arose from coal mine employment and averred that Mr. Salmons retains the respiratory capacity to perform underground coal mine work.

Dr. Broudy was deposed on January 5, 2004 (EX 9). He provided his credentials and reviewed the results of his examination of the claimant. Dr. Broudy reiterated his conclusions and opined that Mr. Salmons's bronchitis is not due to coal mine dust inhalation.

At the request of the OWCP, Dr. Imtiaz Hussain examined the claimant on (DX 1). Dr. Hussain elicited various histories, including a history of never having smoked and 20 years of underground coal mine employment, performing all the underground jobs listed in the other medical reports. Mr. Salmons provided a medical history of wheezing, arthritis, diabetes, and high blood pressure. His chief complaints were wheezing, dyspnea with mild exertion, and a daily productive cough. Dr. Hussain had a chest x-ray taken and administered ventilatory and blood gas studies and an EKG. Physical examination revealed some rhonchi. Dr. Hussain diagnosed simple coal workers' pneumoconiosis due to dust exposure. The basis for his diagnosis was the x-ray he interpreted and the miner's coal dust exposure history. He found a moderate impairment due to pneumoconiosis but opined that Mr. Salmons retains the respiratory capacity to perform the work of a coal miner. Dr. Hussain is board certified in internal medicine and pulmonary medicine.

Dr. Abdulkadar Dahhan examined Mr. Salmons at the request of the Employer, on December 5, 2003 (EX 7). He elicited a coal mine employment history of 20 years, operating a miner, bolt machine, and shuttle car; a medical history significant for hypertension, multiple knee and wrist surgeries, cardiac catheterization, and hyperlipidemia; and a history of never having smoked. He noted complaints of a daily productive cough and occasional wheeze, dyspnea on exertion, and back and chest pain. Dr. Dahhan had a chest x-ray taken and administered ventilatory and blood gas studies, and an EKG. He performed a physical examination that revealed good air entry to both lungs with no crepitation, rhonchi, or wheeze. Dr. Dahhan also reviewed Dr. Wheeler's and Dr. Baker's readings of the June 20, 2001 x-ray, Dr. Hussain's reading of the November 2, 2001 x-ray, the pulmonary function and blood gas studies from June 20, 2001 and April 2, 2002, and the reports of Drs. Hussain and Baker. He found no evidence of coal workers' pneumoconiosis and opined that Mr. Salmons retains the respiratory capacity to perform his last coal mining job. He found no evidence of pulmonary impairment and/or disability due to the inhalation of coal mine dust. Dr. Dahhan is board certified in internal medicine and pulmonary disease (EX 8).

Dr. Dahhan was deposed on January 7, 2004 (EX 10). He provided his qualifications and repeated the results of his examination and explained that his finding of cardiac enlargement was not related to the miner's coal mine employment. Dr. Dahhan deposed that the additional medical evidence he reviewed confirmed his determinations.

### **Burden of Proof**

"Burden of proof," as used in this setting and under the Administrative Procedure Act<sup>11</sup> is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)<sup>12</sup>. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. *Director, OWCP, Department of Labor v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).<sup>13</sup>

A claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.<sup>14</sup> Therefore, the claimant cannot rely on the Director to gather evidence.<sup>15</sup> A claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

### **Pneumoconiosis**

Under the Act, to receive benefits, a claimant must prove several facts by a preponderance of the evidence. First, the coal miner must establish the presence of pneumoconiosis.<sup>16</sup>

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<sup>11</sup> 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

<sup>12</sup> The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); *Kaiser Steel Corp. v. Director, OWCP* [Sainz], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

<sup>13</sup> Also known as the risk of nonpersuasion, see 9 J. Wigmore, *Evidence* § 2486 (J. Chadbourn rev.1981).

<sup>14</sup> *Id.*, also see *White v. Director, OWCP*, 6 BLR 1-368 (1983)

<sup>15</sup> *Id.*

<sup>16</sup> 20 C.F.R. §718.201.

Pneumoconiosis under the Act is defined as both clinical pneumoconiosis and/or any respiratory or pulmonary condition significantly related to or significantly aggravated by coal dust exposure:

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §§ 718.201.

Note that the definition appears to combine the first two elements of entitlement, pneumoconiosis and cause of pneumoconiosis. However, the claimant bears the burden of establishing both that he or she has pneumoconiosis and that the pneumoconiosis arose out of coal mine employment.

There are four methods for determining the existence of pneumoconiosis.

- (1) Under 20 CFR § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.
- (2) Under §§ 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.
- (3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of §§ 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; §§ 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of §§ 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.
- (4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §§ 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.



First, with respect to proof of x-ray testing under § 718.202 (a)(1), frequently, there are conflicting interpretations of chest x-rays by physicians presented in black lung claims. Such is the case in this matter. There are seven interpretations of four separate x-rays. The first x-ray, taken June 20, 2001, was read as positive (category 1/0) by Dr. Baker, a B-reader. It was reread as negative for the disease by Dr. Wheeler, who is both a B-reader and a board-certified radiologist. I defer to Dr. Wheeler's interpretation because of his superior credentials. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The second x-ray, taken October 2, 2001, was found negative (category 0/1) by Dr. Broudy, a B-reader, and was not reread. Consequently, I consider this film negative.

The third x-ray, taken November 2, 2001, was read as positive (category 2/2) by Dr. Hussain, who has no particular credentials for interpreting x-rays. Two dually-certified readers, Drs. Alexander and Wheeler, reread this film and came to opposite opinions. Dr. Alexander found category 1/1 pneumoconiosis, while Dr. Wheeler again found no evidence of coal workers' pneumoconiosis. Giving equal weight to these two physicians' readings, I find that the preponderance of the evidence does not favor a finding that this x-ray is positive.

The final x-ray, dated December 16, 2003, was read as negative by Dr. Dahhan, a B-reader, and was not reread. This x-ray is the most recent by two years, and I place more weight on it because pneumoconiosis can be a latent and progressive disease. *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163 (6<sup>th</sup> Cir. 1997); *Woodward v. Director, OWCP*, 991 F.3d 314 (6<sup>th</sup> Cir. 1993).

In summary, there are three positive and four negative readings. Of the positive readings, one is by a B-reader and one is by a dually certified reader. Of the negative readings, two are by B-readers and two are by dually certified readers. Based on the above discussion and the interpretation of the most recent x-ray, I find that the x-ray evidence under § 718.202(a)(1) does not support a finding of the existence of pneumoconiosis by a preponderance of the evidence.

Second, under § 718.202 (a)(2), there is no biopsy evidence in the record. Accordingly, the claimant can not establish the existence of pneumoconiosis under this section.

Third, none of the enumerated presumptions apply in this case under § 718.202(a)(3).

Fourth, under § 718.202(a)(4), "the Judge must consider and weigh all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence . . . ." *Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986). There are three physicians' opinions under 718.202 (a)(4). Drs. Baker and Hussain diagnosed pneumoconiosis while Drs. Broudy and Dahhan did not. Where the medical opinions are in conflict, the Judge must discuss the conflicting evidence and provide a rationale for choosing one physician's opinion over another. *McGinnis v. Freeman United Coal Mining Co.*, 10 B.L.R. 1-4 (1987).<sup>17</sup>

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<sup>17</sup> All the evidence relevant to the existence of pneumoconiosis must be considered and weighed. Thus, in *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986), the Board upheld a finding

All four physicians are board certified in both internal medicine and pulmonary disease, and these superior qualifications entitle their opinions to great weight. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Because the credentials are equivalent, however, this cannot be a basis for crediting one opinion over another. All four opinions are also well documented, based on physical examination, accurate smoking and coal mine employment histories, and x-ray reports. *Perry*, 9 BLR 1-1 (1986). The opinions of Drs. Broudy and Dahhan are supported by readings of Dr. Wheeler and by the overall x-ray evidence. Furthermore, their opinions are supported by their clinical findings of clear lungs. Moreover, Dr. Dahhan had the opportunity to review more medical evidence of record, including the reports of Drs. Hussain and Baker, thus providing him with a more thorough understanding of Mr. Salmons's health. For these reasons, I credit both opinions and place considerable weight on Dr. Dahhan's conclusion.

Dr. Baker's opinion is not supported by his clinical findings, and he failed to explain his conclusion of pneumoconiosis despite this fact. Both he and Dr. Hussain based their diagnoses on their x-ray readings and the miner's coal mine employment history. Each film was found negative by Dr. Wheeler, and, more importantly, it has been held that an administrative law judge may place less weight on an opinion that is based solely on a coal mine employment history and an x-ray reading. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, I do not find the opinions of Drs. Baker and Hussain as probative as those of Drs. Broudy and Dahhan.

After considering the four medical opinions, I place most weight on Dr. Dahhan's opinion. Accordingly, I find that the medical opinion evidence pursuant to § 718.202(a)(4) does not establish the existence of pneumoconiosis.

Consideration of all the evidence under § 718.202(a) shows that the Claimant has failed to establish, by a preponderance of the evidence, the existence of pneumoconiosis.

### **Causal Relationship Between Pneumoconiosis and Coal Mine Employment**

The Act and the Regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for ten or more years. 30 U.S.C. § 921(c)(1); 20 CFR § 718.203(b) (2002). Mr. Salmons was employed as a miner for twenty years, and therefore he would be entitled to the presumption if he had established the existence of pneumoconiosis.

### **Total Disability**

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that the claimant had not established the existence of pneumoconiosis even where the x-ray evidence of record was positive. The Board concluded that the "Judge's assignment of less weight to the record's positive x-rays was rational and based on substantial evidence," where "the weight of other medical evidence indicat[ed] that claimant's impairment was due to interstitial fibrosis of unknown etiology." *Id.* at 1-68. Positive x-rays may form the basis of a finding of the existence of pneumoconiosis; however, they must be considered in light of all the relevant evidence.

Again, a claimant has the burden of proving every element of entitlement, by a preponderance of the evidence. See *Director, OWCP v. Greenwich Collieries*, supra; *Oggero*, supra; *Gee v. W.G. Moore and Sons*, supra; *Wike v. Bethlehem Mines Corporation*, supra; *Tenney v. Badger Coal Company*, supra; *DeFelice v. Consolidation Coal Company*, supra.

Section 718.204(b) defines “total disability” as follows:

A miner shall be considered totally disabled if ... pneumoconiosis as defined in § 718.201 prevents or prevented the miner:

- (1) From performing his or her usual coal mine work; and
- (2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

The regulations at §§ 718.204(b) provide the following five methods to establish total disability: (1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinions; and (5) lay testimony. 20 C.F.R. §§ 718.204(b). The claimant carries the burden of proof to establish the necessary element of a change in condition (§ 725.309) as well as the elements of disease (§ 718.202), disease causation (§ 718.203), disability (§ 718.204(c)), and disability causation (§ 718.204(b)).

All four pulmonary function studies are within normal limits (DE 14, 17, EX 2; EX 7). Therefore, total disability cannot be established pursuant to § 718.204(b)(2)(i).

Four blood gas studies were submitted into evidence (DE 14, EX 2, DE 16, EX 7). None of them produced qualifying values. Accordingly, I find that the blood gas study evidence under § 718.204(b)(2)(ii) does not establish total disability.

There is no evidence of cor pulmonale. Therefore, § 718.204(b)(2)(iii) is not available to the claimant.

Of the four physicians providing opinions on the issue of disability, Drs. Broudy, Hussain, and Dahhan opined that the claimant is not totally disabled and retains the respiratory capacity to perform the work of an underground coal miner. Dr. Baker appears to have assessed total disability. However, his report is not entitled to probative weight because it is belied by the non-qualifying pulmonary function studies and blood gas studies, including those he administered himself. It is also indefinite and unclear. He found a class 1 impairment based on the pulmonary function study results but explained that this meant the miner’s FEV1 and FVC were both greater than 80%. He did not explain how such values could equate to total disability. In the next paragraph, Dr. Baker concluded that the AMA Guides “would imply” that the miner is 100% occupationally disabled for work in the coal mining industry because, according to him, they state that a person with pneumoconiosis should “limit further exposure to the offending agent.” In fact, a recommendation against further coal dust exposure, without addressing the claimant’s

physical capacity to do his usual coal mine employment, is not sufficient to establish total disability. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988). Furthermore, Dr. Baker's use of the words "would imply" renders his opinion equivocal. *Justice*, 11 BLR 1-91 (1988).

I place great weight on the opinions of Drs. Broudy, Hussain, and Dahhan on this issue because their reports are well documented and reasoned and supported by the pulmonary function studies and the blood gas studies they administered, and all such evidence of record. Dr. Dahhan also had the opportunity to review Dr. Baker and Dr. Hussain's reports and found that they supported his conclusion that the claimant is not totally disabled from a respiratory standpoint. Physical examination findings further support their conclusions. All three physicians were well aware of the miner's last coal mining job and felt that from a respiratory standpoint, he could continue in that capacity. Because I place most weight on the opinions of Drs. Broudy, Hussain, and Dahhan, I find that the claimant has failed to establish, by a preponderance of the evidence, total respiratory disability pursuant to § 718.204(b)(2)(iv).

A review of Mr. Salmons's testimony shows that he suffers from diabetes, high blood pressure, and cholesterol problems, and has difficulty with his knees and back (Tr. 16). Claimant has treated with Dr. James Chaney for a long time, and he has prescribed inhalers. He has difficulty tolerating perfume, the smell of cooking, and cleaning agents. He sleeps on five pillows and smothers at night, awakening several times a night (Tr. 17-18). Mr. Salmons has a productive cough in the morning and at night, when he also experiences wheezing. He has difficulty exerting himself, finding that he becomes light headed and short of breath (Tr. 18). He can walk 100 yards without becoming short of breath but finds inclines difficult. *Id.* This testimony establishes that Claimant suffers from a variety of medical problems, but none of them was linked by any examining physician to pneumoconiosis. Moreover, in a living miner's claim, lay testimony cannot support the finding of a totally disabling respiratory impairment in the absence of corroborating medical evidence. *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999).

After reviewing all the evidence, both like and dislike, under § 718.204(b)(2), I find that the medical evidence overwhelmingly fails to establish total disability, and the claimant's testimony is insufficient to overcome the contrary evidence. Consequently, I find that Mr. Salmons has failed to establish total respiratory disability.

### **Conclusion**

Timothy Salmons has failed to prove that he is afflicted by pneumoconiosis arising out of coal mine employment. He has also not proved that he has a totally disabling respiratory condition. Accordingly, the claim filed by Timothy Salmons seeking federal black lung benefits is denied as the evidence is insufficient to prove any of the medical elements necessary for entitlement.

### **Attorney's Fees**

The award of an attorney's fee is permitted only in cases in which the Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of attorney's fees to the Claimant for services rendered in pursuit of this claim.

## **ORDER**

It is hereby **ordered** that the claim of Timothy Salmons is **denied**.

**A**

DANIEL F. SOLOMON  
Administrative Law Judge

**Notice of Appeal Rights:** Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, DC 20210.